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No. 92-304

IN THE

Supreme Court of the United States

October Term, 1992

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,

Petitioner,

against

THOMAS SOBOL, Commissioner of Education; the NEW YORK STATE BOARD OF REGENTS; and the NEW YORK STATE EDUCATION DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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(2337—LC7-112—1992)

Counterstatement of Question Presented

Whether the New York State Court of Appeals correctly held that regulations requiring the inclusion of religious representatives on public school AIDS advisory councils do not violate the Establishment Clause of the First Amendment to the United States Constitution, *U.S. Const. amend. I*, where such representatives serve in purely advisory capacities and where the purpose of the regulations is to reach as many students as possible, as early as possible, with accurate information about AIDS.

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Jurisdiction

Petitioner has not fully satisfied Rule 24.1(e) of the Rules of the Supreme Court, requiring all briefs to set forth "the

time factors upon which jurisdiction rests." For the benefit of the Court, therefore, respondents set forth the following. On June 4, 1992, petitioner applied to this Court for an extension of time within which to file a petition for a writ of certiorari. Justice Thomas subsequently issued an order extending such time to and including July 29, 1992. Respondents received a petition for a writ of certiorari on July 28, 1992. On July 31, 1992, however, this Court rejected the petition pursuant to Rule 33.7 of the Rules of the Supreme Court. Petitioner submitted a revised petition, which respondents received on August 14, 1992.

The National School Boards Association (NSBA) has submitted an undated motion to appear as *amicus curiae* in support of the petition for a writ of certiorari. Respondents received NSBA's motion on August 28, 1992, and have opposed said motion in a separate document, pursuant to Rule 21.4 of the Rules of the Supreme Court and instructions from the Court.

This Court's jurisdiction is discretionary, under 28 U.S.C. §1257(a).

Summary of Argument

Respondents Thomas Sobol, the New York State Board of Regents and the New York State Education Department respectfully request that the Court deny the petition for a writ of certiorari, which seeks review of a decision of the New York State Court of Appeals holding that N.Y. Admin. Code tit. 8, §§ 135.3(b)(2) and (c)(2) do not violate the Establishment Clause of the First Amendment to the United States Constitution.

The decision below correctly upheld the regulations, finding no violations of the guidelines set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The decision is consistent with *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649 (1992), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), and with this Court's body of Establishment Clause jurisprudence. The issues have been fully and correctly resolved by New York's highest court. Review by this Court is therefore unnecessary.

Statement of the Case

This is a facial Establishment Clause challenge to regulations promulgated by respondents in response to the epidemic of Acquired Immune Deficiency Syndrome (AIDS).

Respondents are responsible for promulgating and implementing rules and regulations for the management of public schools in New York State. N.Y. Educ. Law §207 (McKinney 1988). In 1987, they approved regulations requiring, *inter alia*, AIDS instruction that is "appropriate" and "consistent with community values" as part of the sequential health education program for all elementary and secondary students. N.Y. Admin. Code tit. 8, §135.3 (1987) (hereinafter "the regulations"). Each local board of education is required to "establish an advisory council which shall be responsible for making recommendations concerning the content, implementation, and evaluation of an AIDS instruction program." *Id.* Each council must "consist of parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations." *Id.* The role of the councils is purely advisory; responsibility for "deter-

min[ing] the content of the curriculum and approv[ing] its implementation" remains with the school boards. *Id.*

Petitioner, an organization of public school districts in New York, commenced the present action in Supreme Court, Albany County, on June 28, 1989. Petitioner challenged the requirement that advisory councils include representatives of religious organizations, contending that it violated the Establishment Clause of the First Amendment to the United States Constitution. U.S. Const. amend. I. Under the guidelines established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602, *supra*, government enactments will be upheld against Establishment Clause challenges if they (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) do not foster excessive government entanglement with religion. *Id.* Petitioner conceded the secular purpose of the regulations, but contended that they violated the second and third prongs of *Lemon*. The parties have stipulated that this action involves no disputed issues of fact, and that the only issue for judicial resolution is the facial constitutionality of the regulations.

The New York Supreme Court upheld the regulations, in a decision dated April 2, 1990. Relying on this Court's decision in *Bowen v. Kendrick*, 487 U.S. 589, *supra* (upholding, under the Establishment Clause, a Federal statute requiring applicants for certain grants to demonstrate how they would "involve" and "make use of" religious organizations in their proposed programs), State Supreme Court found that the primary effect of the regulations was not the advancement of religion. Any such advancement, said the court, was "[i]ncidental or remote," in view of the purely advisory role of the AIDS councils and the require-

ment that the councils include a broad spectrum of the local community as well as members of religious organizations. Nor, said the court, did the regulations foster an "excessive entanglement" of government with religion.

Petitioner appealed to the Appellate Division, Third Department. On June 6, 1991, that court declared that the regulations do not violate the Establishment Clause. The Appellate Division noted that the regulations obviously reflect respondents' "considered judgment that religious organizations," along with other members of the community, "can help solve the problem to which the regulation is addressed." Relying on *Bowen*, the Appellate Division noted that the Establishment Clause permits the State to "recogniz[e] that religion or religious organizations may have a role to play in resolving certain secular problems," and that any effect of the regulation on the advancement of religion was merely "incidental and remote." Like the court below, the Appellate Division emphasized that the function of the advisory council was solely "to make recommendations." Nor did the regulations foster an excessive entanglement of religion with secular matters, for, as the Appellate Division observed, the advisory councils

> perform an essentially secular role in representing the viewpoint of various large segments of the community, and there is no basis for assuming that those representatives [*i.e.*, of religious organizations] are not capable of carrying out their functions under the regulation in a lawful, secular manner.

Petitioner appealed to the New York State Court of Appeals (hereinafter the Court of Appeals), which on March 31, 1992, affirmed the Appellate Division's order. The

Court of Appeals emphasized the unprecedented threat posed by AIDS and the need for an early and vigorous response:

> In the context of the extremely sensitive, complex and escalating threat which society faces from AIDS—unless the broadest audience is reached as early as possible with the most accurate education program possible—it is particularly sensible for government to add the views of religious representatives on an advisory level to the predominant views it will receive from the rest of the community.

"Indeed," said the court, "by including and considering the views of members of the community who are affiliated with religious organizations," respondents guarantee that AIDS education programs will enjoy a "greater societal consensus and, therefore, greater secular effectiveness." Because the primary effect of the regulations is to advance the "rational, legitimate, educational and secular" goal of achieving "a more universal education program," the second prong of *Lemon* is not violated. Like the Appellate Division, the Court of Appeals found that any advancement of religion is "incidental," given the purely advisory role of the councils.

Nor, said the Court of Appeals, do the regulations lead to excessive entanglement with religion. The regulations neither entail "the ongoing monitoring and supervision" involved in financial aid regulations nor do they permit religious institutions to exercise "discretionary governmental functions." Noting that petitioner's challenge to the regulations is facial rather than as applied, the court dismissed as "entirely speculative" petitioner's suggestion that school boards might encounter excessive entanglement

in "sifting through the recommendations of the advisory councils to screen out those that may represent religious dogma." Similarly, the court found "speculative" petitioner's argument that the "need to choose representatives [for the council] from among many religious organizations" would entangle school boards in matters of religion.

REASON FOR DENYING THE WRIT

The decision of the New York State Court of Appeals is consistent with this Court's Establishment Clause jurisprudence.

A. *Lemon v. Kurtzman*

The regulations at issue were upheld below under the guidelines established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602, *supra*. Petitioner concedes that the regulations have a secular purpose. The Court of Appeals agreed. *New York State School Bds. Ass'n v. Sobol*, 79 N.Y.2d 333, 339.

Respondents recognize that the effectiveness of AIDS education absolutely depends upon input from a broad cross-section of the community, including representatives of religious organizations. Specific reference in the regulations to religious representatives, as opposed to other segments of the community, simply reflects the reality that AIDS education compels frank discussion of highly sensitive issues which have religious implications. It is important to note that, under New York law, parents may withdraw their children from certain portions of AIDS instruction. N.Y. Educ. Law §3204(5) (McKinney 1981); N.Y. Admin.

Code tit. 8, §§16.2, 135.3. As the Court of Appeals observed,

> by including and considering the views of members of the community who are affiliated with religious organizations, the Commissioner ensures that the AIDS instruction that is eventually adopted will more likely enjoy greater societal consensus and, therefore, greater secular effectiveness.

By reducing the number of pupils who "opt out," the regulations enable a maximum number of school children to receive essential, accurate information about AIDS. The primary effect of the regulations, therefore, is neither to advance nor inhibit religion.

The regulations do not endorse religion. As this Court has observed, a conclusion that the regulations violate the Establishment Clause would require a determination that they are

> more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools . . . expenditure of public funds for transportation of students to church-sponsored schools . . . federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education . . . noncategorical grants to church-sponsored colleges and universities . . . tax exemptions for church properties . . . Sunday Closing Laws . . . release time program[s] for relig-

> ious training . . . and [] legislative prayers . . . *Lynch v. Donnelly*, 465 U.S. 668, 681-682 (1984) (citations omitted.)

The notion that the disputed regulations are somehow more an endorsement of religion than the permissible activities enumerated above is unfounded.

Respondents underscore, as well, that the regulations exist in an entirely secular context. While calling for the advisory participation of religious representatives, they also *require* the involvement of "secular" individuals: "parents, school board members, appropriate school personnel, and [other] community representatives." N.Y. Admin. Code tit. 8, §135.3(b)(2), (c)(2). Nor do the regulations create a symbolic link between government and religion. None of the dialogue between boards of education and their AIDS advisory councils takes place within the view of students. Nor is the results of such dialogue necessarily reflected in the classroom. The regulations do not constitute a joint exercise of authority, and cannot reasonably be said to create even the appearance of such an arrangement. Pursuant to the regulations, religious representatives simply join with other members of the educational community in providing *advice* to local boards of education. The school boards remain solely responsible for content and implementation of curriculum. In upholding the regulations, the courts below found these considerations compelling.

Petitioner's argument that the regulations violate *Lemon's* "excessive entanglement" prong is entirely speculative and without support in the record. Petitioner contends that the regulations run afoul of this prong by creating a process whereby school districts "might" have to choose represent-

atives from among several community religious organizations, and "might" have to screen inappropriate suggestions from their councils' religious representataives. These "as applied" arguments are factual in nature, however, and not subject to review in this facial challenge. *See, Immigration and Naturalization Serv. v. National Center for Immigrants' Rights*, ____ U.S. ____, 112 S. Ct. 551, 555 (1991).

B. *Lee v. Weisman*

The decision below does not conflict with *Lee v. Weisman*, ____ U.S. ____, 112 S. Ct. 2649, *supra*. *Lee* struck down the practice of permitting clergy to offer invocations and benedictions at public school graduation ceremonies. Finding such practice offensive to the Establishment Clause, the Court stated: "[t]he Constitution forbids the State to exact religous conformity from a student as the price of attending her own high school graduation." *Id.*, at 2660. The Court found the practice so deeply and manifestly offensive to the Establishment Clause that it decided the case "without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured," and thus declined "the invitation . . . to reconsider our decision in *Lemon v. Kurtzman*." *Id.* at 2655. Thus, petitioner's suggestion that *Lee* might support their argument is unfounded: the case does not elaborate on or alter the *Lemon* test. Indeed, *Lee* suggests that the regulations are valid, for it notes in conclusion that

> throughout the course of the educational process, there will be instances when religious values, religious practices, and religous persons will have some interaction with the public schools and their students. *Id.*, at 2661.

Bowen v. Kendrick

The decision below is also consistent with *Bowen v. Kendrick*, 487 U.S. 589, *supra*. Petitioner is mistaken in its contention that the statute under review in *Bowen* did not also *require* consultation with religious representatives. In *Bowen*, the Federal statute at issue, known as AFLA, authorized Federal grants for services and research in the area of premarital adolescent sexual relations and pregnancy. As this Court acknowledged, *id.*, at 603, 604, 607, AFLA specifically required applicants for funding to demonstrate how, using Federal grant money, they would "involve religious and charitable organizations" in their projects. *See*, 42 U.S.C. §300z-5(a)(21)(B). AFLA, said the Court, merely reflected "Congress' considered judgment that religious organizations can help solve the problems to which the [statute] is addressed." 487 U.S. at 606-7. This judgment was entirely permissible, and indeed "quite sensible;" its advancement of religion, if any, was "incidental and remote." *Id.* at 607.

The Court of Appeals' decision does not conflict with or "expand" *Bowen*. The issues addressed by AFLA and by New York's regulations are similarly sensitive and similarly complex. It was plainly permissible and "sensible" for respondents to conclude that the input of religious organizations would provide valuable assistance in coping with the unprecedented difficulties of AIDS prevention and education. Indeed, the participation of religious groups in New York's AIDS education programs is less likely than AFLA to advance religion, for AFLA required grant applicants to "involve" religious organizations directly in their programs, whereas the regulations mandate the participation of "representatives from religious organizations" only at the

advisory level. If, as this Court found in *Bowen*, AFLA's advancement of religion was only incidental and remote, and therefore did not violate the Establishment Clause, then the same must be true of New York's regulations.

The disputed regulations do not exclude anyone from memberships on an AIDS advisory council. To the contrary, the regulations strive specifically for the *inclusion* of all segments of the community in the war against AIDS. Petitioner's contention that religious organizations "enjoy greater participatory privileges than other community groups" (Petition, p. 13) is therefore mistaken. As the Court of Appeals stated:

> No hierarchy or preferential weight is established or ascribed in the regulations, and none can be inferred on this facial analysis. The mandatory list of participants on the councils includes "parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations." There is no fixed over-all number of representatives or proportionate allocation or distribution among the categories . . . the challenged composition of advisory councils is not sufficiently likely to give rise to a perception that the government has favored or preferred religious over nonreligious groups. *New York State School Bds. Ass'n v. Sobol*, 79 N.Y.2d 333, 341, *supra*.

Citing *Bowen*, the court below found that, on the face of the regulations, respondents had successfully maintained " 'a course of neutrality among religions, and between religion and nonreligion.' " *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
September 3, 1992

Respectfully submitted,

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